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in Opinion*

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October 17, 1955

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CONCORD, N.H.

Mr. Stanton C. Otis, Right-of-Way Engineer  
Department of Public Works and Highways  
State House Annex  
Concord, New Hampshire

Re: Taxes and Other Liens of Record

Dear Mr. Otis:

With further reference to your communication of June 29, 1955, and my reply of July 1, 1955, and in further explanation of my opinion of March 16, 1955 to you, I think the following may be helpful, particularly in view of Judge Grimes' letter of October 13, 1955, copy of which has been furnished to you.

By Revised Laws, chapter 80, section 17, "The real estate of every person or corporation shall be holden for all taxes assessed against the owner thereof; and all real estate to whomsoever assessed shall be holden for all taxes thereon. All such liens shall continue until one year from October first following the assessment." By Revised Laws, chapter 77, section 1, "All property taxes for any year following April first shall be assessed upon the invoice taken in that month." Upon tax sale as provided by said chapter the purchaser acquires an equitable lien which, unless redeemed by the owner, may ripen into title.

Accordingly, if property is acquired by the state by deed from a landowner it is important that the deed expressly deal with the subject of taxes or other liens in its text wherever possible. Deeds are exact legal forms. A warranty deed gives, grants, bargains, sells, and conveys property and contains a clause that the grantor will warrant and defend to the grantee the premises which he conveys against the lawful claims and demand of all persons. A quitclaim deed releases, releases and forever quitclaims the right, title and

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interest of the grantor in the described premises and contains the covenant that the grantor will warrant and defend the said premises against the lawful claims of all persons claiming by, from, or under the said grantor.

In other words, the warranty deed not only warrants the title against encumbrances incurred while the grantor owned the premises but also against encumbrances anywhere in the chain of title. The quitclaim deed warrants only that the title conveyed is free from encumbrances incurred while the grantor owned the premises. In 1951 the legislature authorized by statute certain deviations in the form of short form deeds, so called, expressly specifying the text. (Laws of 1951, chapter 173) Instruments which deviate from these forms run the risk of not actually conveying the premises or protecting the parties. Consequently, any deeds which purport to deal with property conveyed to or from the state should comply with the necessary formalities.

Since the passage on March 26, 1955 of what is now chapter 56 of the Laws of 1955, which amends section 3, part 4, chapter 90 of the Revised Laws, as inserted by chapter 133, Laws of 1945 (section 3, chapter 233, RSA) certain holders of undischarged mortgages of record whose mortgages are dated not earlier than twenty years prior to date of filing petition for highway are included among owners. This includes most mortgages and is a reversal by statute of the previously considered opinions of our courts that a mortgagee did not possess such interest as to entitle him to an award.

This change in our law brings with it certain corollary elements of confusion since it is not now clear where this state stands with respect to liens of types other than mortgages and mortgages more than twenty years old and brings the state into apportionments of awards.

The subject of apportionment of awards is more specifically dealt with in Orgel on Valuation Under Eminent Domain, 1st Edition, paragraph 114; Orgel on Valuation Under Eminent Domain, 2nd Edition, paragraph 115 and Jahr on Eminent Domain, Valuation and Procedure, section 125. I understand this latest mentioned book is available to you in your own library. Some states make a distinction between mortgages and

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other liens, taking the position that a mortgage is a proprietary interest in land arising out of contract which cannot be constitutionally abrogated, while a statutory lien is something which the Legislature has the power to abolish and therefore such lien is extinguished by a taking under eminent domain. Massachusetts decision, Collector of Taxes v. Revere Bldg., Inc., 276 Mass. 576, 177 N.E. 577, 7, 112, held that a statutory lien for taxes was extinguished by a taking under eminent domain but there the court pointed out that in addition to being "purely statutory" the lien statute did not provide for its method of enforcement.

In this state we have a statutory lien for taxes and our statute provides a method for enforcement whereby the lien may become title and it seems to me it is imperative when property is purchased agreeably and a deed taken to arrive at an express written stipulation concerning taxes in the deed itself. When property is condemned upon which taxes are due the lien of the taxes would follow the proceeds and attach to the same just as the original lien attached to the land. Nichols on Eminent Domain, 3rd Edition, paragraph 14.243, citing Irvin Coon Company, Inc. v. Board of Assessors, 309 Mass., 544, 36 NE (2nd) 573, says: "The lien of a tax follows the interest of the fee owner as it shifts from the land to the award and is payable out of the award."

Our statute provides, as noted above, that all taxes assessed against an individual are liens upon all of his land. A New York case decided in 1941, Englander v. McHoldrick, 237 NY 583, 33 NE (2nd) 304, holds that only taxes apportioned to the part taken will be deducted from the award. I do not believe that our New Hampshire court would follow this decision in view of the express language of our statute, especially if the state has taken a deed. If we have a situation where the landowner owes tax and where there are attachments on the landowner's property, I believe that as the law now stands, the only safe course is to deposit the award with the State Treasurer as provided in Revised Laws, chapter 90, part 4, section 15, as inserted by Laws of 1945, chapter 196, rather than making payment directly to the owner unless complete written agreement covering full distribution of the award signed by all parties concerned can be obtained. By Laws of 1955, chapter 64, banks

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have statutory authority to re-loan to the borrower up to the amount of the original mortgage without making a new instrument, thereby in my opinion making such re-loans, if made after other liens have attached to the property, liens which will have to be litigated as to priority. In such cases tax liens and all other statutory liens must be considered.

Very truly yours,

George F. Nelson  
Assistant Attorney General

GM:IL

cc - Frank D. Merrill, Commissioner  
Dept. of Public Works & Highways

Leonard Hadley, Assistant  
Right-of-way Division